varies. In some jurisdictions the court makes a preliminary examination and then puts further questions upon the suggestion of counsel;[13] in others, the court, after the preliminary examination, turns the jurors over to counsel for further questioning;[14] in still others the entire examination is conducted by counsel.[15] In all the scope of the examination is not unlimited, merely because there is no precise issue made by a challenge and its denial. Any question which calls for facts that will enable counsel to determine the advisability of challenging for cause or peremptorily is proper; but the examination is conducted under the supervision of the trial judge, and his ruling upon the propriety of a particular question will not be reversed except for abuse of discretion.[16] There is, therefore, no reason for the unseemly spectacle, occasionally witnessed, of a court permitting counsel to waste days and weeks in irrelevant and useless inquiries addressed to prospective jurors. The remedy for such disgraceful proceedings is not a reversion to an outgrown procedure which makes the right of challenge of slight value but the installation of trial judges with the character and energy to exercise their discretion sanely and courageously.

E. M. M.

SEARCH, SEIZURE, AND THE FOURTH AND FIFTH AMENDMENTS

In the light of a number of recent decisions of the Federal Supreme Court, it seems safe to assert that the cherished rights of the people to security in their persons, houses, papers, and effects against unreasonable searches and seizures, as vouchsafed them by the Fourth Amendment to the Federal Constitution, are in no immediate danger of dissolution. Every man's home is still his castle; and this fundamental doctrine of personal freedom, fought for and achieved by the valiant Wilkes, over a century and a half ago in England,[1] still flourishes with a sturdy vigor. Its renewed vindication by the courts has been partly occasioned by activities of various over-zealous federal agents in the enforcement of the Eighteenth Amendment.

The use of the search warrant for the apprehension of stolen goods was exercised in England from the earliest times.[2] It is to the abuse

[13] See e. g. *Williams v. State* (1921, Miss.) 87 So. 273; *Funches v. State* (1921 Miss.) 87 So. 487.

[14] See e. g. *State v. Ellis, supra* note 12.

[15] This is the practice in most of the cases cited in note 12 *supra*.

[16] *Union Pacific Ry. v. Jones, supra* note 12; *Martin v. Lilly* (1919) 188 Ind. 139, 121 N. E. 443; *National Bank v. Romine* (1911) 154 Mo. App. 624, 136 S. W. 21; *Strong v. State* (1921, Neb.) 183 N. W. 559; *State v. Ellis, supra* note 12; *State v. Turley* (1913) 87 Vt. 163, 88 Atl. 562; *Carpenter v. Hyman, supra* note 12. The same doctrine is indicated in most of the cases cited in note 12 *supra*.

[1] *Wilkes Case* (1763, C. P.) 19 How. St. Tr. 982. See Cooley, *Constitutional Limitations*, (7th ed. 1903) 426, note.

[2] Blackstone, *Commentaries*, *290.

of this necessary governmental power, rather than to its proper legal use, that the Fourth Amendment owes its existence. "General warrants" in England, for the hounding of seditious publications, and "writs of assistance" in this country, for the apprehension of smuggled goods, placed, as John Adams said, "the liberty of every man in the hands of every petty officer."[3] It was these broadside writs that the framers of our Constitution had in mind when they so effectually provided against their recurrence.

The Fourth Amendment not only forbids "unreasonable searches and seizures" but also sets forth the requisites of a lawful search.[4] The protection thus guaranteed embodies an old common-law principle, and the tendency of the courts has been to favor the individual. Although it is a federal limitation only and does not affect the states,[5] it has been included by all the states in their constitutions or bills of rights.[6]

It has always been well settled that search warrants are confined to criminal actions and cannot be used for private ends;[7] nor can they be issued until a "probable cause" has been duly determined to exist. There must be such a state of facts as would lead a reasonable man to believe that a crime has been committed.[8] The specific evidential facts constituting probable cause must be asserted under oath to exist. A mere affidavit that the affiant has "good reason to believe" that named persons on certain premises were possessed of and unlawfully sold liquor is insufficient.[9] The propriety of issuing a search warrant is to be determined by the facts, not by rumor, suspicion or guess-work."[10]

Sufficient facts having been sworn to, there must be a warrant issued to legalize the search. Recent decisions show a tendency on the part of the courts to regard a warrant as essential, even where permission to

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[3] 2 Bancroft, *History of the United States* (1890) 546-548.

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

[5] *Adams v. New York* (1904) 192 U. S. 585, 24 Sup. Ct. 372; *Burdeau v. McDowell* (1921) 41 Sup. Ct. 574; *Johnson v. State* (1921, Ga.) 109 S. E. 662.

[6] Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

[7] *State v. Schmuck* (1908) 77 Ohio St. 438, 83 N. E. 797; *United States v. Maresca* (1920, S. D. N. Y.) 266 Fed. 713.

[8] The mere statement of a person under the influence of liquor as to its place of procurement appears not to be probable cause, even though the statement is shown by the search to be true. *People v. De Vasto* (1921, Sup. Ct.) 190 N. Y. Supp. 816. It is entirely possible that the compliance with the technical rules of search warrant, so strictly enforced by the courts in such cases as this, would not be subjected to such close scrutiny if the case involved seditious acts rather than an infraction of the liquor laws,—an unfortunate commentary on the times.

[9] *United States v. Ray & Schultz* (1921, E. D. Mich.) 275 Fed. 1004.

[10] *United States v. Kelih* (1921, S. D. Ill.) 272 Fed. 484; see also Cooley, *op. cit.* 429.

search has been given by the occupants of the premises, because such permission may be due to coercion.[11] An alleged waiver of this constitutional protection must be shown by clear and positive testimony. Mere acquiescence is no waiver.[12] As to whether such a search by consent would have been regarded as unreasonable by those who framed our Constitution may be problematical; but such decisions clearly evidence the liberal tendencies of the courts. The warrant must be issued by an officer having jurisdiction of the search,[13] before such search,[14] and cannot be subsequently altered to fit the circumstances by the searching officers, even though with the consent of the issuing officer.[15]

The purpose for which it is issued must be "reasonable."[16] That is, search warrants may be issued for the recovery of stolen property, for the apprehension of articles used in the commission of a felony, or to terminate a possession that is itself illegal; but property of mere evidentiary value may not be seized, even with a search warrant.[17]

The warrant must contain a particular description of the place to be searched. A description of an apartment building, when the place searched was only one of the apartments in such building, has been held too general, and the warrant vacated.[18] The thing to be seized must also be described, seizure of a different kind of property than that specified being a trespass.[19]

The practical unanimity which the courts have exhibited in enforcing rights against search and seizure has not been displayed in determining the admissibility of evidence secured by an illegal seizure. In the case of *Boyd v. United States*,[20] Mr. Justice Bradley asserted that the intro-

[11] *Dukes v. United States* (1921, C. C. A. 4th) 275 Fed. 142.

[12] *United States v. Lydecker* (1921, W. D. N. Y.) 275 Fed. 976; *United States v. Kelih, supra* note 10; *Amos v. United States* (1921) 225 U. S. 313, 41 Sup. Ct. 266; but see *Bruner v. Commonwealth* (1921, Ky.) 233 S. W. 795; *McClurg v. Brenton* (1904) 123 Iowa, 368, 98 N. W. 881; *Smith v. McDuffee* (1914) 72 Or. 276, 143 Pac. 929.

[13] *People v. 738 Bottles of Intoxicating Liquor* (1921, Co. Ct.) 116 Misc. 252, 190 N. Y. Supp. 477.

[14] *New York v. One Hudson Cabriolet* (1921, Co. Ct.) 116 Misc. 399, 190 N. Y. Supp. 481.

[15] *United States v. Mitchell* (1921, N. D. Calif.) 274 Fed. 128.

[16] In *Gouled v. United States* (1921) 255 U. S. 298, 309, 41 Sup. Ct. 261, 265, the court, speaking through Mr. Justice Clarke, held that search warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken." See (1921) 30 YALE LAW JOURNAL, 769.

[17] *Gouled v. United States supra,* note 16.

[18] *United States v. Mitchell supra,* note 15.

[19] *State v. Slamon* (1901) 73 Vt. 212, 50 Atl. 1097; but see *Bruner v. Commonwealth, supra* note 12.

[20] (1885) 116 U. S. 616, 6 Sup. Ct. 524.

duction of evidence secured by search and seizure is in effect a violation of that part of the Fifth Amendment which provides against compulsory self-incrimination.[21] Basing this dictum on a previous dictum of Lord Camden,[22] he held the evidence inadmissible.[23] On the other hand, there is a well-settled rule of procedure to the effect that the court, largely to avoid a collateral issue, will receive any competent evidence without inquiry into the means by which it was procured.[24] Following this general rule, the United States Supreme Court changed its position in the case of *Adams v. New York*,[25] and there first enunciated the rule that evidence, even though obtained by illegal search and seizure, is admissible. Ten years later the same court weakened the rule, and held that the defendant, by a seasonable demand before trial, could require the return of articles seized as evidence, and that use thereof, after such demand was in effect compulsory self-incrimination.[26] Following this, the case of *Silverthorne Lumber Co. v. United States*[27] held that the government could not utilize information secured by an illegal search; and in the recent *Gouled* case[28] the "seasonable demand" rule was held inapplicable when the defendant had no knowledge of the adverse possession of the evidence until its production in court.[29] The "seasonable demand" rule has been rendered practically innocuous by two more

[21] "Nor shall (any person) be compelled in any criminal case to be a witness against himself."

[22] "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." *Entick v. Carrington & Three Other Kings Messengers* (1765, C. P.) 19 How. St. Tr. 1029, 1073.

[23] "They (the Fourth and Fifth Amendments) throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment, are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States, supra* note 20, at p. 633, 6 Sup. Ct. at p. 534.

[24] Benson v. State (1921, Ark.) 233 S. W. 758; *Johnson v. State* (1921, Ga.) 109 S. E. 662; 4 Wigmore, *Evidence* (1905) sec. 2183; see also *State v. Turner* (1910) 82 Kan. 787, 109 Pac. 654; 136 Am. St. Rep. 129, 135, note.

[25] (1904) 192 U. S. 585, 24 Sup. Ct. 372.

[26] *Weeks v. United States* (1914) 232 U. S. 383, 34 Sup. Ct. 341.

[27] (1920) 251 U. S. 385, 40 Sup. Ct. 182.

[28] *Gouled v. United States, supra* note 16.

[29] Mr. Justice Clarke in his opinion in that case, at p. 312, said, "Where in the progress of a trial it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an object to their admission."

recent cases, one of which allowed a demand after the jury was sworn,[30] and the other allowed an objection just prior to the final charge to the jury.[31] This line of cases clearly indicates a short lease of life for the battered remnant of the original rule that a demand is essential to bring the evidence within the Fifth Amendment.

It is submitted that the supposed relation and inter-dependence of the Fourth and Fifth Amendments is fundamentally unsound, and that the rule originating therein, that a search warrant will not issue for matter of mere evidentiary value, likewise has no valid basis in history, justice, or policy. One amendment preserves the inviolability of the person and the home, the other protects the innocent from inquisition; and it seems reasonable to believe that the framers of the Constitution contemplated no duplication. If the Fifth Amendment actually applied to private papers illegally procured and used in evidence over objection, the question of who procured the evidence would clearly be immaterial, and would in no way affect the compulsory nature of the so-called self-incrimination. But the federal courts have no hesitancy in admitting such evidence when procured by one not connected with the federal government.[32] The distinction is illogical if the application of the Fifth Amendment is sound; but the inconsistency of the court in this matter is further evidence of the unsoundness of such application. The gradual disintegration of the "seasonable demand" rule, which lent color to the claim of privilege, brings us to the astonishing situation that although the government knows as a fact the existence of damning documents in the possession of the defendant, if such documents are merely evidential in nature they cannot be reached either by a subpoena duces tecum[33] or by a search warrant regularly issued. This is surely "justice tampered with mercy."[34]

CERTIFYING ALTERED CHECKS UNDER THE NEGOTIABLE INSTRUMENTS LAW*

When a drawee bank certifies a check which has fallen into dishonest hands and been materially altered before the certification, what is the

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[30] *Amos v. United States, supra* note 12.

[31] *Holmes v. United States* (1921, C. C. A. 4th) 275 Fed. 49.

[32] In *Burdeau v. McDowell* (1921) 41 Sup. Ct. 574, 576, the court said: "We see no reason why the fact that individuals unconnected with the government may have wrongfully taken them (the papers) should prevent them from being held for use in prosecuting an offense, where the documents are of an incriminatory character." In the same case it was pointed out that mere retention of papers so obtained does not constitute search and seizure. See (1922) 31 YALE LAW JOURNAL, 335.

[33] The defendant, in supplying evidence under such a subpoena, is regarded as coming within the constitutional protection, because he does in fact by his own act incriminate himself.

[34] 4 Wigmore, *Evidence* (1905) sec. 2251.

* [This comment was received after the decision involved had been considered